

No. 85-5221

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

Supreme Court, U.S.
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RANDALL LAMONT GRIFFITH,
Petitioner,
-vs-
COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Kentucky

Brief of The National Legal Aid And
Defender Association As Amicus Curiae

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INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a private, non-profit, national membership organization headquartered in Washington, D.C. whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically,

NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases and 586 defender offices engaged in providing representation to indigents accused of criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners.

The NLADA is vitally interested in ensuring that the indigent criminal defendants its members represent are guaranteed their right to be tried by constitutionally comprised juries. In this case the Court will be deciding whether the rule of Batson v. Kentucky will be applied to all defendants whose convictions were not yet final at the time the rule was announced. Extension of the benefits of Batson to those on direct appeal would contribute to the goal of NLADA of promoting equal justice under the law.

SUMMARY OF ARGUMENT

Since the rule of Batson v. Kentucky furthers the goal of enhancing the accuracy of the truth-finding function of the jury, has more than a prophylactic function, and is not such a clear break with the past that prospective effect only is mandated, principled decisionmaking and fairness to similarly situated defendants requires that the rule of Batson be extended to all defendants whose convictions were not final at the time it was announced.

ARGUMENT

RETROSPECTIVE APPLICATION OF BATSON v. KENTUCKY TO ALL NONFINAL CONVICTIONS IS CONSISTENT WITH THIS COURT'S DECISIONS IN UNITED STATES v. JOHNSON AND SHEA v. LOUISIANA THAT EXTENDING THE BENEFITS OF A NEW RULE TO ALL CASES PENDING ON DIRECT APPEAL AT THE TIME THE RULE IS ANNOUNCED IS MANDATED BY CONSI-

DERATIONS OF PRINCIPLED DECISIONMAKING AND FAIRNESS TO SIMILARLY SITUATED DEFENDANTS.

In Batson v. Kentucky, 106 S.Ct. 1712 (1986), this Court took an historic step toward eliminating racial discrimination in jury selection, a practice this Court has consistently condemned, by recognizing that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Batson, 106 S.Ct. 1712, 1722. To the extent that lower courts had interpreted Swain v. Alabama, 380 U.S. 202 (1965) to require proof of repeated striking of blacks over a number of cases to establish a violation of the Equal Protection Clause, Batson rejected this evidentiary formulation as inconsistent with standards that had developed since Swain for assessing a prima facie case under the Equal

Protection clause. Batson, 106 S.Ct. 1712, 1721.

Although this Court then determined in Allen v. Hardy, ___ U.S. ___ (No. 85-6593, June 30, 1986), that Batson effected a change in the burden of proving unconstitutional abuse of the peremptory challenge which should not be applied retroactively to convictions that were final at the time Batson was decided, the same result cannot be justified in the direct appeal context. While retroactive application of new rules of constitutional law generally does little to advance the purposes of collateral relief on habeas, so that it is particularly difficult in such cases to justify imposing upon the State the costs of collateral review, Solem v. Stumes, 465 U.S. 638, 654 (Powell, J., concurring), different considerations compel the conclusion that all defendants whose convictions were not final at the time Batson was announced should have the benefit of that decision. Retrospective application of new

rules to federal habeas corpus petitioners is unnecessary because review designed to determine that the conviction rests upon correct application of the law at the time of the conviction is all that is required to force trial and appellate courts to toe the constitutional mark. Mackey v. United States, 401 U.S. 667, 687 (Harlan, J., concurring and dissenting). However, it is an indefensible departure from the model of judicial review to "simply [fish] one case from the stream of appellate review, [use] it as a vehicle for pronouncing new constitutional standards, and then [permit] a stream of similar cases subsequently to flow by unaffected by that new rule." Mackey, 401 U.S. 667, 679.

In United States v. Johnson, 457 U.S. 537, 549 (1982) and Shea v. Louisiana, 105 S.Ct. 1065 (1985), retroactive effect was given to new rules announced in the Fourth and Fifth Amendment areas to all cases pending on direct review where the new rule

did not so change the law that prospectivity was the proper course. The identical considerations that persuaded this Court in Johnson and Shea that a fair resolution of the retroactivity question was to apply the new rule to all cases not final at time the new rule was announced persuade that the same conclusion be reached here. Retroactive application of Batson to all nonfinal convictions would provide a principle of decisionmaking consonant with the original understanding of retroactivity found in Linkletter v. Walker, 381 U.S. 618 (1965) and Tehan v. Shott, 382 U.S. 406 (1966), would comport with this Court's judicial responsibility to do justice to each litigant on the merits of his own case, and would further the goal of treating similarly situated defendants similarly. Johnson, 457 U.S. 537, 554, 555. It would allow this Court to avoid being in the position of a super-legislature, selecting one of several cases before it to announce the new rule and then letting all

other similarly situated persons be passed by unaffected and unprotected by the new rule. Shea, 105 S.Ct. 1065, 1069. Failure to apply Batson to all cases pending on direct review at the time of the decision would violate these norms of constitutional adjudication. Johnson, 457 U.S. 537, 546.

Although Johnson addressed solely the retroactivity of a new Fourth Amendment rule to direct appeal cases, this Court in Shea noted that there is nothing about a Fourth Amendment rule which suggests that it should be given greater retroactive effect than a Fifth Amendment rule, which may be more likely to affect the truth-finding process than a Fourth Amendment violation. Shea, 105 S.Ct. 1065, 1070. The equal protection deprivation that Batson is designed to protect against also has a bearing on the truthfinding function of a criminal trial. Allen v. Hardy, ___ U.S. ___ (Slip Opinion, p. 4). Just as exclusion of minority viewpoint by decreasing the size of the jury or

elimination of the unanimity requirement unconscionably increases the risk of inaccurate fact-finding, Brown v. Louisiana, 447 U.S. 323, 333, 334 (1980), by removing from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable, depriving the jury of a perspective on human events that may have unsuspected importance on any case that maybe presented, Peters v. Kiff, 407 U.S. 493, 502-504 (1972), exclusion of minority viewpoint by discriminatory use of the peremptory challenge creates a great potential for harm. The counterbalancing of various biases which is critical to the accurate application of the common sense of the community to the facts of any given case, Ballew v. Georgia, 435 U.S. 223, 234 (1978), is sacrificed. The reasoning of Johnson and Shea should therefore be extended to Equal Protection Clause violations.

THE RULE OF BATSON v. KENTUCKY IS
NOT SUCH A "CLEAR BREAK WITH THE

PAST" THAT PROSPECTIVE EFFECT ONLY
IS MANDATED.

Batson v. Kentucky merely reaffirmed the principle of Swain v. Alabama, 380 U.S. 202 (1965), that the Equal Protection Clause is offended where the State purposefully excludes blacks from jury participation, and reexamined the standards for assessing whether a defendant had met his burden of establishing a prima facie showing of purposeful discrimination in the prosecution's use of its peremptory challenges. Subsequent to Swain this Court had recognized that a defendant may discharge his burden of demonstrating purposeful discrimination in jury selection by relying solely on the facts concerning selection of the jury in his case. In Batson the Court concluded that a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Because

Batson merely repeated Swain's warning to prosecutors "that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause," Batson, 106 S.Ct. 1712, 1725 (White, J., concurring), and tailored the burden to be sustained by the defendant who claims an equal protection violation to the prevailing standards, it cannot be construed as a "sharp break in the web of the law," Milton v. Wainwright, 407 U.S. 371, 381 n. 2 (1972), as to be given no retroactive effect.

Batson did not create an entirely new rule which in effect replaced an older one, Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 498 (1968), but approved and modified an existing rule. To the extent that the rule was modified, the modifications were distinctly foreshadowed by intervening decisions, which recognized that a consistent pattern of official racial discrimination is not a necessary predicate to a violation of

the Equal Protection Clause, Batson, 106 S.Ct. 1712, 1722, which fact weighs in favor of retroactive application. Berger v. California, 393 U.S. 314, 315 (1969). Batson did not invalidate a practice of unquestioned legitimacy, Brown v. Louisiana, 447 U.S. 323, 335 (1980), or disapprove a practice sanctioned in prior cases. United States v. Johnson, 457 U.S. 537, 551 (1982). The principle that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been excluded has been consistently and repeatedly affirmed in numerous decisions dating from Strauder v. West Virginia, 100 U.S. 303 (1980). Batson, 106 S.Ct. 1712, 1719. Batson therefore does not fall into that narrow class of decisions whose non-retroactivity is effectively preordained because they unmistakably signal a clear break with the past.

BATSON v. KENTUCKY IS NOT A MERE PROPHYLACTIC RULE DESIGNED TO PROTECT EXISTING RIGHTS BUT ENHANCES THE TRUTH-FINDING FUNCTION OF A CRIMINAL TRIAL AND THEREFORE ITS MINIMAL DISRUPTIVE EFFECT ON THE ADMINISTRATION OF JUSTICE MUST BE TOLERATED.

That only those defendants who can demonstrate that the prosecutor's illegal use of his peremptory challenges denied them equal protection of the law will obtain relief from their convictions pursuant to Batson weighs in favor of retrospective application. Generally, if retroactive application of a new rule would occasion reversal in many instances in which no actual prejudice has been suffered, prospective application is favored. Michigan v. Payne, 412 U.S. 47, 54 (1973). In Michigan v. Payne, North Carolina v. Pearce, 395 U.S. 711 (1969) was held to be nonretroactive because retroactive application would require

repudiation of sentences imposed in circumstances where there was no genuine possibility of vindictiveness. Moreover, those defendants who had in fact suffered retaliatory sentencing were not without a remedy but could assert their claim that they had been denied due process. Accord Solem v. Stumes, 465 U.S. 638, 644 (1984) and Stovall v. Denno, 388 U.S. 293, 299 (1967).

The rule of Batson, however, is not a prophylactic one which would occasion windfall benefits for defendants who have suffered no constitutional deprivation. Michigan v. Payne, 412 U.S. at 53. Only those defendants who are able to demonstrate that the prosecutor's use of his challenges was racially motivated, i.e., who have in fact suffered the constitutional deprivation Batson is designed to eliminate, will benefit. The injury they will have suffered is substantial inasmuch as the rule in Batson has bearing on the truthfinding function of a criminal trial. Allen v. Hardy, ___ U.S. ___

(Slip Opinion, p. 4). If Batson is given no retroactive effect, defendants who have been denied equal protection have no remedy.

Retrospective application of Batson to nonfinal convictions will have little disruptive effect on the administration of justice. Unlike collateral review cases, the time lapse between the jury selection and the hearing envisioned by Batson in direct review cases will not be so great as to render it impossible for a prosecutor to recall his reasons for his challenges,¹ especially since prosecutors have been put on notice by the denial of certiorari in McCray v. New York, 461 U.S. 961 (1983) and the grant of certiorari in Batson that some adjustment in the burden of proving a prima facie case of discrimination might be forthcoming and it

¹ As this Court noted in Shea, 105 S.Ct. 1065, 1071, any excessive delay in a direct appeal is as much the fault of the State as it is of the defendant.

has not been uncommon in recent years for prosecutors to volunteer their reasons for exercise of challenges, either in response to a trial objection or an argument made in a reviewing court, in anticipation of a change in the law. The observation made in Brown v. Louisiana, 447 U.S. 323, 337 (1980) is also apt: what little disruption to the administration of justice results from retroactive application must be considered part of the price we pay for former failures to provide fair procedures. Batson recognized that the prior evidentiary requirement that dictated that several must suffer discrimination before one could object, was inconsistent with the promise of equal protection to all. Batson, 106 S.Ct. 1712, 1722. Denial of retrospective application of Batson to direct appellants would merely perpetuate this injustice and further delay restoration of the confidence of the public and the accused in the fairness of the jury system.

CONCLUSION

In order to do justice to those defendants who have been denied equal protection of the law by the prosecution's discriminatory use of the peremptory challenge, Batson v. Kentucky, must be retrospectively applied to all cases pending on direct appeal at the time the decision was announced.

Respectfully submitted,

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